

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANCY HYDER,

Plaintiff,

v.

KEMPER NATIONAL SERVICES, INC.;  
LUMBERMAN'S MUTUAL INSURANCE CO.;  
BROADSPIRE SERVICES, INC.; VODAFONE  
AMERICAS, INC.; VODAFONE AMERICAS,  
INC., SHORT TERM DISABILITY PLAN;  
VODAFONE AMERICAS, INC., LONG TERM  
DISABILITY PLAN; VODAFONE EMPLOYEE  
HEALTH PLAN; VODAFONE EMPLOYEE DENTAL  
PLAN; VERIZON WIRELESS, INC.; and  
DOES 1 TO 50, inclusive,

Defendants.

No. C 05-1782 CW

ORDER  
ADJUDICATING  
PLAINTIFF'S ERISA  
CLAIMS

Defendants Kemper National Services, Inc. (Kemper),  
Lumberman's Mutual Insurance Co. (Lumberman's), Broadspire  
Services, Inc. (Broadspire), Vodafone Americas, Inc., Long Term  
Disability Plan (the LTD Plan), and Vodafone Americas, Inc., Short  
Term Disability Plan (the STD Plan) (collectively, moving  
Defendants<sup>1</sup>) move pursuant to Federal Rule of Civil Procedure 56,

<sup>1</sup>In this Order, all references to "Defendants" refer to the  
moving Defendants only.

1 or in the alternative Rule 52, for judgment on Plaintiff Nancy  
2 Hyder's Employee Retirement Income Security Act (ERISA) claims  
3 against them. Plaintiff opposes the motion and separately cross-  
4 moves for summary adjudication of her ERISA claims. Defendants  
5 oppose the cross-motion. The matters were heard on January 13,  
6 2006.

7 Having considered all of the papers filed by the parties and  
8 oral argument on the motions, the Court grants the motions in part  
9 and denies them in part, as explained below.

#### 10 BACKGROUND

11 The facts below are undisputed unless otherwise noted.

12 According to her complaint, Plaintiff is a former employee of  
13 non-moving Defendant Vodafone Americas, Inc. (Vodafone). The STD  
14 Plan and the LTD Plan were established for Vodafone employees and  
15 are employee welfare benefit plans as defined by ERISA, 29 U.S.C.  
16 § 1002. Both plans are administered by Kemper and its successor-  
17 in-interest, Broadspire. The STD Plan is self-funded, but the LTD  
18 Plan purchased insurance from Lumberman's.

#### 19 I. Plan Documents

20 According to the Plan Documents, which address both the STD  
21 Plan and the LTD Plan, the STD Plan covers replacement of some or  
22 all earnings of a Vodafone employee if he or she has a "qualifying  
23 disability," defined as "any medically determinable physical or  
24 mental condition arising from an illness, pregnancy, or injury that  
25 prevents you from performing the essential duties of your job."

P0416.<sup>2</sup> "Documentation, including physician certification and objective medical evidence," is required to support the claimed disability. Id. No provision of the subsection pertaining to the STD Plan specifically vests discretion in Kemper to interpret the Plan or adjudicate claims. In order to file a STD claim, applicants are instructed to,

[c]all the Claims Administrator (Kemper) at [number] no later than your eighth calendar day of absence to initiate the claims process. If you expect that your disability will last more than seven days, call sooner. Be prepared to provide your treating physician's name and telephone number, the date of your first day of absence, the nature of your disability, your regular work schedule, and your supervisor's name and telephone number.

If you are unable to call, have a family member or your attending physician call for you. Failure to call promptly may disqualify you from receiving benefits.

P04020 (emphasis in the original). The Plan Documents further provide that "STD benefits will be denied or end" if an applicant fails to "[f]ile your claim by calling Kemper by your eighth calendar day of absence." P0422. However, "[i]f Kemper and Vodafone determine that your failure to meet these conditions was due to reasonable cause, your benefits may be reinstated for any period you were not in compliance." Id.

The LTD Plan provides benefits equal to sixty percent of earnings. P0424. Disability means

that a significant change in your physical or mental condition due to:

1. Accidental bodily injury;
2. Sickness;
3. Mental Illness;
4. Substance Abuse; or
5. Pregnancy,

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<sup>2</sup>Unless otherwise noted, citations refer to the administrative record attached to the First Penrose Declaration.

1 began on or after your Coverage Effective Date and has caused  
2 your inability to perform, during the Benefit Qualifying  
3 Period and the following 24 months, the Essential Functions of  
4 your Regular Occupation or of a Reasonable Employment Option  
5 offered to you by the Company, and as a result you are unable  
6 to earn more than 80% of your Pre-disability Monthly Income.

7 After that, you must be so prevented from performing the  
8 Essential Functions of any Gainful Occupation that your  
9 training, education and experience would allow you to perform.

10 Id. However, in the case of disabilities resulting from or caused  
11 by "Self-Reported Conditions," defined as conditions which "can not  
12 be verified and measured using generally accepted standard medical  
13 procedures and practices," including "fatigue, loss of energy [and]  
14 pain," benefits are limited to a total of twenty-four months.

15 P0425. A subsection entitled "Benefit Qualifying Period" explains  
16 that an employee may become qualified for benefits under the LTD  
17 Plan after 180 days of disability, exhaustion of sick leave or  
18 termination of salary continuation or STD benefits, whichever  
19 occurs last. P0424.

20 "Coverage" under the LTD Plan terminates on the date an  
21 employee's employment terminates, or sooner if the company's  
22 participation or the employee's eligibility changes. P0426. On  
23 the other hand, benefits once received terminate only upon one of  
24 ten conditions, e.g. "the date you are no longer disabled." Id.

25 The Plan Documents instruct LTD applicants to "notify Kemper  
26 or Kemper's authorized representative that you are unable to work  
27 due to sickness or injury as soon as reasonably possible, but in no  
28 event more than 30 days after the start of the period for which you  
are filing a claim." Id. An applicant may then send Kemper  
"written proof . . . of your claim" after fifteen days if Kemper  
has not provided the applicant with forms. Id.

1 A separate "Proof of Loss" subsection explains that "proof  
2 that you are unable to work due to sickness or injury" must be  
3 provided to Kemper "no later than 30 days prior to the end of the  
4 Benefit Qualifying Period." P0427. However, "[i]f it was not  
5 reasonably possible to provide proof that you were unable to work  
6 due to sickness or injury within that time frame, it will not  
7 affect the validity of your claim as long as you provide such proof  
8 as soon as reasonably possible thereafter." Id.

9 For the LTD Plan, Kemper "reserves full discretion and  
10 authority to . . . administer claims, and interpret all policy  
11 terms and conditions." P0433. A separate agreement between  
12 Lumberman's and Natlsco, Inc.,<sup>3</sup> grants the latter "discretionary  
13 authority to interpret the terms of the Policy and to otherwise  
14 determine a claimant's eligibility for benefits throughout the  
15 claim process." LMB0004.

16 The Plan Documents provide that a claimant may not start a  
17 legal action until "60 days after proof of your claim has been  
18 given" or "[m]ore than three years after the date when your proof  
19 of claim was required." P0432. The parties dispute the meaning of  
20 this contractual limitation clause.

21 Benefit amounts "will be offset by the amounts of any other  
22 benefits" which the recipient is entitled to receive as a result of  
23 the same period of disability, and Kemper reserves the right to  
24 collect overpayments. P0414, P0427.

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26  
27 <sup>3</sup>Natlsco, Inc., is an entity related to Kemper and is now also  
28 known as Broadspire.

## 1 II. Plaintiff's Disability and Application for Benefits

2 Plaintiff was initially diagnosed with mononucleosis in  
3 December, 1999. HYD112. At that time, she worked for Vodafone as  
4 an Assistant Treasurer in San Francisco. At the advice of her  
5 doctor, she worked from home and only a few hours a day. When she  
6 inquired about filing for short-term disability benefits, Plaintiff  
7 later told Kemper, she was informed by Josh Lucas, a Vodafone Human  
8 Resources Manger,

9 that since I was a salaried employee, and not paid on an  
10 hourly basis, any time I spent working from home on a  
11 particular day was considered a normal workday. Therefore, it  
12 was not necessary to file for short-term disability insurance,  
13 since Vodafone would continue to pay me my normal salary as  
14 long as I worked part-time from home.

15 HYD112.<sup>4</sup> Plaintiff went back to work part-time in January and  
16 full-time on March 31, 2000. Upon returning to full-time  
17 employment, Plaintiff was assigned to work in England on a rotating  
18 basis, necessitating a trans-Atlantic round-trip every three weeks.  
19 Plaintiff agreed to stay on this rotational assignment until April  
20 1, 2001.

21 On January 30, 2001, while working in England, Plaintiff  
22 became sick with what she believed to be flu. She described her  
23 condition as,

24 totally exhausted, both physically and mentally. It was  
25 virtually impossible for me to concentrate on any cognitive  
26 exercise. I felt disoriented and dizzy when standing up. I  
27 was experiencing night sweats, fever, chills, muscle aches,  
28 swollen glands and sore throat.

HYD112. Although Plaintiff tested positive again for

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26 <sup>4</sup>Facts relating to Plaintiff's interactions with Vodafone are  
27 drawn from the information she supplied to Kemper, and are assumed  
28 to be true for the purpose of this motion only.

1 mononucleosis, her doctor believed that the illness was  
2 attributable to another cause. Plaintiff again began to work from  
3 home part-time on her doctor's orders. On April 2, 2001, after she  
4 returned to the United States, Plaintiff met with Mark Hickey,  
5 Vodafone Vice-President of Human Resources. He gave her a  
6 severance notice which explained that unless she obtained another  
7 job within Vodafone within sixty days, she would be terminated on  
8 June 1, 2001. The letter offered Plaintiff a \$105,854.60 severance  
9 package if she would agree to release any claims she might have  
10 against Vodafone. Second Penrose Decl., Ex. A, April 1, 2001  
11 Letter from Mark A. Hickey to Nancy Hyder. Plaintiff asked Mr.  
12 Hickey for information about the company's disability plan and how  
13 disability would affect her severance package. Mr. Hickey told  
14 Plaintiff he would contact her once he found more information, but  
15 he never did so. Plaintiff claims that since she no longer had job  
16 responsibilities or an office in San Francisco, "[i]t was therefore  
17 understood that I was relieved of duty, and would be excused with  
18 pay until June 1, 2001." HYD113.

19 In May, 2001, Plaintiff contacted her doctor and explained  
20 that she was still experiencing the same symptoms. The doctor  
21 "excused" Plaintiff from work until November 1, 2001. HYD113.

22 In a July 6, 2001 letter to Mr. Hickey regarding Vodafone's  
23 request that she sign a release of her claims against it, Plaintiff  
24 again asked for "information on how my disability affects my  
25 termination/severance benefits." HYD227. Vodafone Human Resources  
26 Manager Bob Rosemeyer responded in a July 18, 2001 letter,

27 Mark said he did not recall a conversation with you regarding  
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1 your health, or your request for information on how your  
2 disability would affect your termination and severance  
3 benefits. You state that you were disabled on the date of  
4 your termination on June 1, 2001, yet our records do not  
5 indicate that a claim was filed with Kemper, our Short Term  
Disability plan administrator. But even if you were  
determined to have been disabled and eligible for STD  
benefits, those benefits would have expired on your  
termination date.

6 HYD228. On August 10, 2001, Plaintiff wrote back that she did not  
7 understand Mr. Rosemeyer's letter, noting that she "did not even  
8 know how or with whom to file a claim" because she was never given  
9 the disability plan information. HYD230-31. She continued,

10 I am very concerned there may be benefits I am entitled to as  
11 a disabled person that I am currently unaware of because I do  
12 not have access to the plan documents. I am not comfortable  
13 signing the Release of Claims document Mark gave me on April  
2nd until I understand precisely what benefits are included in  
each Vodafone benefit package I might qualify for.

14 I ask that you consider this to be my third request for  
information on the Vodafone disability plans.

15 HYD231. On August 27, 2001, Mr. Rosemeyer sent Plaintiff copies of  
16 the STD and LTD Summary Plan Descriptions.<sup>5</sup> Second Penrose Decl.,  
17 Ex. C, August 27, 2001 Letter from Bob Rosemeyer to Nancy Hyder.  
18 He told her that she could accept Vodafone's proffered severance  
19 benefit "without prejudice to your ability to qualify for long-term  
20 disability benefits."<sup>6</sup> Id. Plaintiff did not accept the severance

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21  
22 <sup>5</sup>The Summary Plan Descriptions sent by Mr. Rosemeyer to  
23 Plaintiff refer to her previous employer, Airtouch, which merged  
24 with Vodafone in 1999. The Claims Administrator referred to in the  
Summary Plan Descriptions is a company called Matrix Absence  
Management, Inc. HYD238.

25 <sup>6</sup>A later draft severance agreement proposed by Vodafone would  
26 have excepted from the general release any claims by Plaintiff  
27 against Kemper under the LTD Plan or against Vodafone for benefits  
under its retiree health plan and reduced the severance benefit to  
\$69,962.06. Second Penrose Decl., Ex. E, Draft Addendum to  
Severance Agreement. Plaintiff rejected this offer.



1 package.

2 Believing that her eligibility for STD benefits had terminated  
3 on June 1 but that she could be eligible for LTD benefits after a  
4 period of 180 days of disability, Plaintiff called Kemper on  
5 December 13, 2001. According to Kemper's intake records, Plaintiff  
6 told it that her STD eligibility began on May 21, 2001, that her  
7 first full date of absence from work was also May 21, and that she  
8 had been terminated on June 1, 2001 and was currently receiving  
9 California State disability benefits. HYD097. According to  
10 Plaintiff, Angela, the Kemper representative, at first said that  
11 she did not know how to file a LTD claim if a STD claim had not  
12 been filed previously, and later told Plaintiff that filing a STD  
13 claim was a prerequisite to filing for LTD benefits. HYD114.

14 In a letter dated January 2, 2002, Kemper characterized  
15 Plaintiff's claim as one for STD benefits and denied it on the  
16 grounds that she had failed to call in her claim no later than her  
17 eighth day of absence from work. HYD093. The letter explained  
18 that Plaintiff could file a written request for review of this  
19 determination "within sixty (60) days from [her] receipt" of the  
20 letter. Id.

21 In a letter dated March 8, 2002, Plaintiff appealed this  
22 determination on two grounds: (1) that she was not provided with  
23 information about Vodafone's disability plan, that Vodafone's Human  
24 Resources Manager provided her with inconsistent information, and  
25 thus that she did not know how or with whom to file a timely claim;  
26 and (2) that any failure to file for STD benefits was irrelevant to  
27 her eligibility for LTD benefits, and that her "sole intention" in  
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1 contacting Kemper in December, 2001 was to file a LTD claim.  
2 HYD113-114. Plaintiff emphasized that she had "no desire to claim  
3 any benefits under the STD plan." Id. at HYD114. She informed  
4 Kemper that on February 28, 2002, a specialist confirmed her  
5 doctor's diagnosis of chronic fatigue, agreeing that the illness  
6 prevented Plaintiff "from performing the usual and customary duties  
7 associated with the job of Assistant Treasurer for a multi-national  
8 corporation" and excusing Plaintiff from work "indefinitely."  
9 HYD113.

10 In a letter dated April 8, 2002, Kemper denied Plaintiff's  
11 appeal. It reasoned that the initial denial letter "was sent on  
12 12/31/01" and should have been received by Plaintiff "within 3-5  
13 days," but that Kemper did not receive the appeal until March 18,  
14 2002, and thus Plaintiff filed it "over two weeks past the accepted  
15 date in order to appeal." HYD109. Plaintiff countered in an April  
16 15, 2002 letter that she did not receive the initial denial until  
17 January 8, 2002, according to Kemper's own delivery instructions on  
18 the Federal Express packing slip, and thus her appeal was timely.  
19 HYD100. Kemper never responded to this letter.

20 According to an internal June 6, 2002 Kemper email, Kemper  
21 realized by that point that Plaintiff was "requesting LTD," and  
22 already possessed letters and provider notes sent by Plaintiff.  
23 HYD094. Kemper employee Dorothy D. Perron requested that an LTD  
24 application be sent to Plaintiff. Id. In a June 10, 2002 letter,  
25 Kemper provided Plaintiff with an application for LTD Plan  
26 benefits. Plaintiff was instructed to return the completed forms  
27 "within three weeks (July 1, 2002)" and to authorize the release of  
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1 her medical information to Kemper. HYD085-087.

2 Plaintiff submitted her completed application for LTD benefits  
3 on June 27, 2002. She explained that she was disabled due to  
4 chronic fatigue, causing "fevers, night sweats, dizziness,  
5 sleeplessness and extreme exhaustion," and that her doctor had  
6 ordered mandatory rest. HYD074 (emphasis in original). She  
7 reported being able to water her plants twice weekly, walk her dog  
8 ten to twenty minutes per day, do laundry once a week and  
9 participate in two twenty-minute physical therapy sessions per  
10 week. Id.

11 In a letter dated July 11, 2002, Kemper informed Plaintiff  
12 that it was investigating her disability status, that it would  
13 contact her and her physician for information on her current  
14 medical condition and treatment plan, and that it would inform her  
15 of a decision after it had received the necessary information.  
16 HYD082. Inconsistently, Kemper drafted another July 11, 2002  
17 letter telling Plaintiff that review of her claim and been  
18 completed, and that she was not eligible for LTD benefits.<sup>7</sup>  
19 HYD071. In a fax dated July 12, 2002, Plaintiff informed Kemper  
20 that she would be represented by an attorney, Susan F. Williamson.  
21 HYD147.

22 In an August 7, 2002 letter, Kemper informed Plaintiff that  
23 her application for LTD benefits was denied because her June 1,

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24  
25 <sup>7</sup>Plaintiffs says that she never received the July 11 denial of  
26 her benefits, which was apparently produced in connection with this  
27 litigation, and theorizes that Kemper decided not to send the  
letter because it had received a voice message that same day  
indicating that Plaintiff would be represented by counsel. HYD274.

1 2001 termination rendered her ineligible. It cited the Proof of  
2 Loss section of the Plan Documents requiring applicants to notify  
3 Kemper "as soon as reasonably possible, but in no event more than  
4 30 days after the start of the period for which you are filing a  
5 claim." HYD145. This letter is virtually identical to the July 11  
6 denial letter. Kemper did not advise Plaintiff how she might  
7 appeal the decision to deny her LTD benefits.

8 Plaintiff hired her present counsel, Richard Johnson, in 2004.  
9 Kemper, by then known as Broadspire, provided Mr. Johnson with a  
10 copy of Plaintiff's file on May 20, 2004. On September 29, 2004,  
11 Mr. Johnson filed an appeal of the decisions to deny Plaintiff both  
12 STD and LTD benefits. He provided updated information about  
13 Plaintiff's medical condition, showing that an MRI had revealed a  
14 brain lesion causing a multiple sclerosis-like "demyelinating brain  
15 disorder, which causes and has caused, among other things: pain,  
16 burning and tingling sensation in Ms. Hyder's arm; tremor and loss  
17 of motor skills; dizziness; gait disturbance; lack of balance and  
18 coordination; severe and chronic fatigue; impaired cognitive  
19 skills; and lack of ability to concentrate." HYD277-78. Mr.  
20 Johnson's appeal was accompanied by a report from Dr. Peter Madill,  
21 Plaintiff's current treating physician, who concluded based on a  
22 review of her previous medical records that Plaintiff had been  
23 "completely disabled from being able to perform any and all of the  
24 duties of her executive position with Vodafone in May of 2001."  
25 HYD279. Dr. Madill also completed a Residual Functional Capacity  
26 Questionnaire for Plaintiff in which he diagnosed a "demyelinating  
27 brain disorder," and described Plaintiff's impairments in some  
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1 detail, concluding that she was "incapable of even 'low stress'  
2 jobs" due to her frequent need for rest periods during the day.  
3 HYD291.

4 Broadspire rejected this appeal on November 8, 2004,  
5 reiterating its position that Plaintiff's application for STD  
6 benefits was untimely, and stating that Plaintiff was ineligible  
7 for LTD benefits because she "did not meet the elimination period  
8 (26 weeks of Short Term Disability)." HYD311. Its Appeal  
9 Coordinator advised that Plaintiff "should have contacted her Human  
10 Resources Department for clarification" if she was uncertain  
11 whether to apply for STD benefits. HYD310. Plaintiff filed this  
12 lawsuit on February 25, 2005 in Sonoma County Superior Court.  
13 Defendants removed the case to federal court on April 29, 2005.

#### 14 DISCUSSION

##### 15 I. Standard of Review

16 ERISA provides Plaintiff with a federal cause of action to  
17 recover the benefits she claims are due under the Vodafone LTD and  
18 STD Plans. 29 U.S.C. § 1132(a)(1)(B). The parties dispute the  
19 applicable standard of review; Plaintiff argues that the denial of  
20 her claims under both the STD Plan and the LTD Plan should be  
21 reviewed de novo, while Defendants contend that those decisions  
22 should be reviewed for abuse of discretion.

##### 23 A. Applicable Law

24 The standard of review of a plan administrator's denial of  
25 ERISA benefits depends upon the terms of the benefit plan. Absent  
26 contrary language in the plan, the denial of ERISA benefits is  
27 reviewed under a de novo standard. Firestone Tire & Rubber Co. v.

1 Bruch, 489 U.S. 101, 115 (1989). However, if "the benefit plan  
2 expressly gives the plan administrator or fiduciary discretionary  
3 authority to determine eligibility for benefits or to construe the  
4 plan's terms," an abuse of discretion standard is generally  
5 applied. Id.; Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469,  
6 1471 (9th Cir. 1993). The Ninth Circuit has also referred to this  
7 as an "arbitrary and capricious" standard. McKenzie v. Gen. Tel.  
8 Co. of Cal., 41 F.3d 1310, 1314 & n.3 (9th Cir. 1994); Taft, 9 F.3d  
9 at 1471 n.2 (use of the term "arbitrary and capricious" versus  
10 "abuse of discretion" is a "distinction without a difference").

11 However, even where a benefit plan expressly grants  
12 discretionary authority to the plan administrator, a district court  
13 may nevertheless apply a more stringent standard of review if the  
14 plaintiff can show that a conflict of interest exists. Hensley v.  
15 Northwest Permanente P.C. Retirement Plan & Trust, 258 F.3d 986,  
16 995 (9th Cir. 2001). An apparent conflict arises where the plan  
17 administrator is also the insurer. Tremain v. Bell Indus., Inc.,  
18 196 F.3d 970, 976 (9th Cir. 1999). In such cases, the court must  
19 "look further into the plan administrator's dual role by applying  
20 the 'less deference' test." McDaniel v. Chevron Corp., 203 F.3d  
21 1099, 1108 (9th Cir. 2000). The test is two pronged: (1) the  
22 plaintiff must provide material, probative evidence tending to show  
23 an actual conflict of interest, which (2) shifts the burden of  
24 proof to the plan administrator to show that the apparent conflict  
25 did not affect the decision to deny or terminate benefits. Id. If  
26 there is probative evidence of an actual conflict and the plan  
27 administrator cannot rebut it, the denial of benefits is reviewed

1 de novo. Nord v. Black & Decker Disability Plan, 356 F.3d 1008,  
2 1010 (9th Cir. 2004), on remand from Black & Decker Disability Plan  
3 v. Nord, 538 U.S. 822 (2003).

4 In a de novo review of a defendant's decision to deny  
5 benefits, the court must decide whether a plaintiff is disabled  
6 under the terms of the plan. In Juliano v. Health Maintenance  
7 Organization of New Jersey, Inc., 221 F.3d 279, 287-88 (2nd Cir.  
8 2000), the Second Circuit held that it was the plaintiffs' burden  
9 "to establish that they were entitled to [the] benefit [sought]  
10 pursuant to the terms of the Contract or applicable federal law."  
11 Following Juliano, the Court concludes that Plaintiff must carry  
12 the burden to prove that she was disabled under the meaning of the  
13 plan. Sabatino v. Liberty Life Assur. Co., 286 F. Supp. 2d 1222,  
14 1232 (N.D. Cal. 2003). On de novo review, the Court may weigh  
15 contradictory evidence. Newcomb v. Standard Ins. Co., 187 F.3d  
16 1004, 1007 (9th Cir. 1999).

17 B. STD Plan Standard of Review

18 Plaintiff maintains that the STD Plan determinations should be  
19 reviewed de novo because the language in the Plan Documents  
20 explicitly vesting Kemper with discretion is contained in the  
21 subsection dealing with only the LTD Plan, and therefore does not  
22 apply to the STD Plan.

23 Defendants concede that the vesting language is located only  
24 in the subsection addressing the LTD Plan, but urge the Court to  
25 construe the subsection to apply to both the STD Plan and the LTD  
26 Plan. Defendants point to an adjacent provision requiring  
27 claimants to wait sixty days before filing a lawsuit, and argue  
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1 that a waiting period for the LTD Plan but not the STD Plan would  
2 be inconsistent. Defendants rely on the "long tradition in  
3 contract law of reading contracts sensibly." Beanstalk Group,  
4 Inc., v. AM General Corp., 283 F.3d 856, 869 (7th Cir. 2002)  
5 (quoting Rhode Island Charities Trust v. Engelhard Corp., 267 F.3d  
6 3, 7 (1st Cir. 2001)).

7 Unlike the contract between merchants in Beanstalk Group,  
8 however, ERISA plans are not garden variety contracts and are not  
9 interpreted as such. An ERISA plan's conferral of discretion must  
10 be "unambiguous"; "ambiguities are construed contra proferentem,"  
11 in favor of the insured. Kearney, 175 F.3d at 1090. The vesting  
12 language, based on its location, does not unambiguously apply to  
13 the STD Plan, and therefore the Court construes the plan in  
14 Plaintiff's favor. Accordingly, the Court reviews the denial of  
15 Plaintiff's STD benefits de novo.

16 C. LTD Plan Standard of Review

17 With respect to the LTD Plan, Plaintiff maintains that this  
18 claim should also be reviewed de novo despite clear language  
19 vesting discretion because (1) the identity of the entity vested  
20 with discretion is ambiguous and (2) there is both an appearance of  
21 conflict and material, probative evidence tending to show a breach  
22 of duty.

23 The Plan Documents confer discretion on "Kemper," elsewhere  
24 defined as "Kemper Insurance Company, the Plan's insurer." P0421.  
25 Unlike the self-funded STD Plan, however, the LTD Plan purchased  
26 insurance from Lumberman's. Furthermore, "Kemper Insurance  
27 Company" is not Kemper's actual name, which is Kemper National  
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1 Services, Inc. (later known as Broadspire). According to  
2 Defendants, "Kemper Insurance Companies" is a trade name that  
3 includes Lumberman's, Kemper and Broadspire. Defs.' Resp. to Pl.'s  
4 Cross-Mot. at 13. In a separate agreement, Lumberman's has granted  
5 any authority to administer claims to Natlsco, Inc., a name by  
6 which Broadspire has been known.

7 Under ERISA, a named fiduciary may delegate its fiduciary  
8 responsibilities:

9 The instrument under which a plan is maintained may expressly  
10 provide for procedures . . . (B) for named fiduciaries to  
11 designate persons other than named fiduciaries to carry out  
fiduciary responsibilities (other than trustee  
responsibilities) under the plan.

12 29 U.S.C. § 1105(c)(1). The Ninth Circuit has held that where the  
13 ERISA plan expressly gives its administrator discretionary  
14 authority, and that administrator delegates its discretionary  
15 authority by properly designating another fiduciary, then the  
16 "arbitrary and capricious" standard for review still applies.  
17 Madden v. ITT Long Term Disability Plan for Salaried Employees, 914  
18 F.2d 1279, 1283 (9th Cir. 1990). Plaintiff shows that there is  
19 ambiguity regarding which entity is named as the administrator.  
20 However, this particular ambiguity cannot be resolved in her favor.  
21 The ambiguous reference conferring discretion on "Kemper Insurance  
22 Company, the Plan's insurer" could be construed either to refer to  
23 Kemper or to the insurer, Lumberman's. If the former, then Kemper  
24 had discretion to administer Plaintiff's claims. If the latter,  
25 then Kemper still had discretion to administer Plaintiff's claims  
26 pursuant to its agreement with Lumberman's; Plaintiff has not shown  
27 that the distinction between Kemper, Broadspire and Natlsco is  
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1 material here.

2       Plaintiff contends in the alternative that there is both an  
3 appearance of conflict and material, probative evidence of conflict  
4 tending to show a breach of fiduciary duty. First, the ambiguity  
5 between who the insurer is and who is vested with discretion  
6 suggests some apparent conflict, as do the Plan Documents which on  
7 their face delegate authority to "the Plan's insurer." At the  
8 hearing, counsel for Defendants conceded the appearance of  
9 conflict.

10       Plaintiff has identified several pieces of evidence tending to  
11 show a breach of duty. Plaintiff points to the two July 11, 2002  
12 letters, one stating that Kemper would investigate her claim, which  
13 it never did; another, possibly unsent, peremptorily denying her  
14 claim as untimely. There is no evidence that Kemper did  
15 investigate her claim. Plaintiff also notes the inconsistent and  
16 misleading rationales given for denying her LTD benefits: that she  
17 was not a member of an "eligible class" due to her termination or  
18 that she could not get LTD benefits due to her failure to apply for  
19 and receive STD benefits. Defendants offer no explanation for  
20 these irregularities and inconsistencies. Defendants' ultimate  
21 rationale for denying Plaintiff's request for benefits is  
22 procedural rather than substantive, but the mixed information given  
23 suggests that the procedural issues at stake were in fact not  
24 clear. Therefore, the Court reviews the denial of Plaintiff's  
25 request for LTD benefits de novo.

26 II. STD Benefits

27       Defendants move for adjudication of Plaintiff's STD claim in  
28

1 their favor, on the grounds that it is barred because (1) the STD  
2 Plan requires that notice of a claim be provided within eight days  
3 of injury; and, in the alternative, because (2) Plaintiff waived  
4 her STD claim when she told the claim administrator that she was  
5 not seeking STD benefits. Plaintiff counters that Defendants are  
6 estopped from asserting the eight-day deadline.

7 A. Timely Notice

8 Plaintiff concedes that the STD Plan requires claimants to  
9 contact Kemper within eight days of injury, and that she did not do  
10 so. She argues that the Plan Documents create an exception for  
11 reasonable cause, and that her failure to contact Kemper in a  
12 timely manner was justified.

13 The Plan Documents state that benefits will be reinstated if a  
14 claimant's failure to meet Plan conditions, including the eight day  
15 filing deadline, "was due to reasonable cause." Plaintiff says  
16 that she did not apply for STD benefits because she was not  
17 provided with the Plan Documents. Furthermore, she had been told  
18 misleadingly by her employer that as long as Vodafone was paying  
19 her, she did not need to file a disability claim. Finally, she was  
20 informed on July 18, 2001 by Mr. Rosemeyer that her eligibility for  
21 STD benefits had expired.<sup>8</sup> Plaintiff does not claim her

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22  
23 <sup>8</sup>Kemper never considered these reasons because it denied  
24 Plaintiff's appeal on the ground that it was untimely. The Court  
25 agrees with Plaintiff that her appeal was, in fact, timely. Kemper  
26 incorrectly stated that its letter was sent on December 31, 2001  
27 when it was dated January 2, 2002 and delivered, according to the  
28 FedEx delivery slip, on January 8. The initial denial letter  
merely instructed Plaintiff to file her appeal within sixty days of  
her receipt; it did not state that an appeal had to arrive within  
sixty days.

1 impairments prevented her from filing a claim with Kemper. Cf.  
2 Weyrauch v. CIGNA Life Ins. Co. of New York, 416 F.3d 717 (8th Cir.  
3 2005) (finding dispute of fact as to whether prospective claimant's  
4 mental condition reasonably prevented him from filing a claim).  
5 Nevertheless, Plaintiff's failure to apply for benefits was  
6 reasonable; without a copy of the Plan Documents, she had no way of  
7 knowing how to file a claim for STD benefits, or when the deadline  
8 would be. The misinformation provided by Vodafone further  
9 undermined her ability to file a timely application. For this  
10 reason, the Court finds that Plaintiff is entitled to STD benefits  
11 despite her failure to contact Kemper within eight days of her  
12 injury.

13 B. Waiver

14 Defendants further argue that Plaintiff "waived" her right to  
15 STD benefits because of the statements made in her March 8, 2002  
16 letter, and thus that she should be estopped from now claiming STD  
17 benefits.

18 Before estoppel can apply, the following conditions must be  
19 met: "1) the party to be estopped must be apprised of the facts;  
20 2) the other party must be ignorant of the true state of facts, and  
21 the party to be estopped must have acted so that the other party  
22 had a right to believe that the party intended its conduct to be  
23 acted upon; and 3) the other party relied on the conduct to its  
24 prejudice." Hinton v. Pac. Enters., 5 F.3d 391, 396-97 (9th Cir.  
25 1993) (quoting Golden v. Faust, 766 F.2d 1339, 1341 (9th Cir.  
26 1985)).

27 The first two requirements for estoppel are not met here.

1 Plaintiff was not apprised of the true state of facts at the time  
2 she wrote the March 8 letter. She had been misled as to the  
3 application requirements; Kemper admonished that she "should have  
4 contacted her Human Resources Department" if she was uncertain  
5 whether to apply for STD benefits, yet officials in Vodafone's  
6 Human Resources Department did not give her correct information on  
7 that subject. Plaintiff's statement in her March 8 letter that she  
8 did not desire to claim STD benefits referred to her appeal of  
9 Kemper's characterization of her December, 2001 phone call as an  
10 application for STD, but not LTD, benefits. Kemper had no basis to  
11 conclude that Plaintiff intended Kemper to rely on this letter as a  
12 waiver of STD benefits. In these circumstances, Plaintiff cannot  
13 be said to have waived STD benefits, and is not estopped from  
14 claiming them now.

15 Therefore, the Court finds that Plaintiff was entitled to STD  
16 benefits.

### 17 III. LTD Benefits

18 Defendants move for adjudication of Plaintiff's LTD claim in  
19 their favor, on the grounds that she failed to bring her suit  
20 within the Plan Documents' three-year limitations period.

21 Plaintiff opposes the motion on the grounds that (1) the Plan  
22 provisions are too vague to impose an enforceable time bar;  
23 (2) Defendants are estopped from asserting the three-year time bar;  
24 (3) the law provides that a limitations period cannot expire while  
25 an administrative appeal is still pending; and (4) even if the  
26 contractual bar is applied, Plaintiff's lawsuit is timely.

27 The contractual limitations period provides that claimants may  
28

1 not file a lawsuit more than three years after the date when "proof  
2 of your claim was required." Defendants' interpretation is that  
3 "proof of your claim" is equivalent to "proof of the loss," which  
4 the LTD Plan elsewhere requires "not later than 30 days prior to  
5 the end of the Benefit Qualifying Period," i.e. 150 days after  
6 disability begins. P0427. Plaintiff, on the other hand, points to  
7 other language suggesting a likely alternative meaning for "proof  
8 of claim." Applicants are required to notify Kemper no "more than  
9 30 days after the start of the period for which you are filing a  
10 claim," which will prompt Kemper to send the applicant forms to  
11 fill out. P0426. The Plan Documents further provide that if an  
12 applicant does not receive the forms within fifteen days, then he  
13 or she "can send Kemper written proof . . . of your claim." Id.  
14 The language in this last sentence comes closest to the contractual  
15 limitations period's "proof of your claim" reference. Cf. NM  
16 Investors Life Ins. Co. v. Sup. Ct. of Shasta County, 208 Cal. App.  
17 3d 1070, 1073 (1989) (finding policy language requiring lawsuits to  
18 be filed within three years of "proof of loss" to be unambiguous  
19 where term used consistently). Furthermore, this proof of claim  
20 provision does not require that an applicant submit written proof  
21 within fifteen days of notifying Kemper, but rather states that an  
22 applicant can do so.

23 Under this interpretation of the contractual limitations  
24 period, Plaintiff's three years did not begin to run until July 1,  
25 2002, the date by which Kemper required that she return the  
26 completed LTD application form. This interpretation of the Plan  
27 Documents, although contrary to Kemper's, is also reasonable.

1 Because ambiguous language in ERISA Plans is interpreted against  
2 the insurer, the Court finds that Plaintiff's February, 2005  
3 lawsuit was timely filed.

4 Even if Plaintiff's interpretation of the contractual  
5 limitations period were unreasonable, Defendants would be estopped  
6 from asserting that the contractual deadline for filing an action  
7 constitutes a time bar. Kemper's June 10, 2002 letter to Plaintiff  
8 informed her that she had until July 1 to return the form providing  
9 proof of her disability, and she therefore had the right to believe  
10 that this was the date from which the limitations period would run.  
11 Defendants may not prevail in their argument that the lawsuit is  
12 time-barred where Plaintiff has relied on Defendants' conduct to  
13 her prejudice.

14 For these reasons, the Court denies Defendants' motion for  
15 adjudication in their favor of Plaintiff's claim for LTD benefits.  
16 Because the Court finds the Plan language too vague to impose an  
17 enforceable time bar here, it need not consider Plaintiff's  
18 alternative arguments.

#### 19 IV. Disability Determination

20 Plaintiff cross-moves for adjudication of her LTD claim in her  
21 favor. Defendants oppose this motion on the grounds that Plaintiff  
22 has failed to make a prima facie demonstration that she is unable  
23 to perform the essential functions of her job.

24 The parties dispute whether the Court may consider the  
25 additional evidence provided by Plaintiff to Kemper along with her  
26 appeal of its denial of LTD benefits. Defendants rely on the rule  
27 that when a court reviews a disability determination for abuse of  
28

1 discretion, it may only consider the evidence presented to the  
2 plan. Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1471  
3 (9th Cir. 1993). However, Plaintiff did submit this additional  
4 evidence, including Dr. Madill's report, along with her appeal of  
5 Kemper's denial of benefits.

6 Furthermore, this limitation does not apply on de novo review.  
7 Jebian v. Hewlett-Packard Co. Employee Benefits Organization Income  
8 Protection Plan, 349 F.3d 1098, 1110 (9th Cir. 2003). On de novo  
9 review, "new evidence may be considered . . . to enable the full  
10 exercise of informed and independent judgment." Mongeluzo v.  
11 Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 943  
12 (9th Cir. 1995). Even if Plaintiff had not submitted the  
13 additional evidence of disability with her appeal to Kemper,  
14 consideration of new evidence would be appropriate here because  
15 Kemper rejected her application on purely procedural grounds, and  
16 did not investigate her alleged physical impairments.

17 Defendants assert that nothing in the administrative record  
18 demonstrates that Plaintiff could not perform the essential  
19 functions of her job from the period of May, 2001 through 2003.  
20 This assertion ignores the opinion of her treating physician, Dr.  
21 Madill, based on a review of Plaintiff's medical records, that she  
22 was indeed unable to perform any of the duties of her position with  
23 Vodafone beginning in May, 2001. He specifically addresses  
24 Plaintiff's limitations, including severe fatigue, impaired  
25 cognitive skills and inability to concentrate. Dr. Madill's  
26 opinions are more detailed than the "conclusory" opinions deemed  
27 insufficient in Jordan v. Northrup Grumman Corp. Welfare Benefit



1 Plan, 370 F.3d 869, 880 (9th Cir. 2004), and, unlike Jordan,  
2 Defendants do not present a more thorough or careful opinion  
3 refuting Dr. Madill's conclusions. Nor does the fact that  
4 Plaintiff's brain lesion was not diagnosed until after her  
5 disability began mean that Plaintiff was not disabled as of May,  
6 2001. See Thompson v. Standard Ins. Co., 167 F. Supp. 2d 1186,  
7 1194 (D. Or. 2001) (rejecting insurer's contention that court could  
8 not consider later medical records as evidence of prior  
9 disability). The evidence also indicates, and Defendants do not  
10 contest, that Plaintiff cannot perform the "essential functions of  
11 any gainful Occupation that [her] training, education and  
12 experience would allow [her] to perform," as the Plan requires  
13 after twenty-four months.

14 Defendants also conclusorily contend that Plaintiff is subject  
15 to the twenty-four month limitation on "self-reported conditions."  
16 Again, Defendants ignore the more recent evidence that her fatigue  
17 is a symptom of a measurable, verifiable demyelinating brain  
18 lesion.

19 For these reasons, the Court grants Plaintiff's motion for  
20 summary adjudication that she is disabled under the terms of the  
21 LTD plan.

## 22 V. Offsets

23 Defendants move for adjudication that any benefits be offset  
24 by State disability benefits and Social Security benefits, and that  
25 her STD benefits be offset by the amount of the severance package  
26 offered by Vodafone.

27 Plaintiff does not oppose the offsetting of Social Security  
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1 benefits. P0417, P0436. At the hearing, counsel for Plaintiff  
2 conceded that any recovery would also be offset by State disability  
3 benefits. Accordingly, the Court grants Defendants' motion to  
4 offset LTD benefits by the amount of other income benefits received  
5 as a result of that period of disability.

6 However, Defendants have shown no basis for their request that  
7 Plaintiff's STD recovery be offset by the severance package offered  
8 by Vodafone. The Plan provides that disability benefits will be  
9 offset by the amounts of other benefits which the recipient is  
10 entitled to receive "as a result of the Period of Disability."  
11 Here, the severance package was not a benefit Plaintiff was  
12 entitled to receive as a result of the Period of Disability. In  
13 fact, the severance package was offered to Plaintiff on the  
14 condition that she release any claims against Vodafone. She  
15 rejected these terms, and did not receive any severance benefits.  
16 Defendants may not reduce their payments to Plaintiff on the basis  
17 of this unaccepted offer.

#### 18 CONCLUSION

19 For the foregoing reasons, the Court GRANTS Plaintiff's motion  
20 for adjudication under Rule 52, and DENIES Defendant's motion.  
21 Plaintiff's recovery will be offset by the amount of Social  
22 Security and State disability benefits received as a result of that  
23 period of disability. Plaintiff is entitled to receive LTD  
24 benefits. Within two weeks of the date of this order, Plaintiff  
25 shall submit to the Court a proposed calculation of back benefits  
26  
27  
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1 in an amount certain and a formula for calculating pre-and post-  
2 judgment interest.

3 IT IS SO ORDERED.

4  
5 Dated: 6/30/06



6 CLAUDIA WILKEN  
7 United States District Judge  
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